

ESTTA Tracking number: **ESTTA407820**

Filing date: **05/09/2011**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91164764
Party	Defendant The Brinkmann Corporation
Correspondence Address	GARY A CLARK SHEPPARD MULLIN RICHTER & HAMPTON LLP 333 SOUTH HOPE STREET, 48TH FLOOR LOS ANGELES, CA 90071 UNITED STATES gclark@sheppardmullin.com, shwang@sheppardmullin.com
Submission	Reply in Support of Motion
Filer's Name	Susan Hwang
Filer's e-mail	shwang@sheppardmullin.com
Signature	/Susan Hwang/
Date	05/09/2011
Attachments	116943-ReplyBrief.PDF (4 pages)(48824 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

BRINK’S NETWORK, INCORPORATED,

Opposer,

v.

THE BRINKMANN CORPORATION,

Applicant.

Opposition No. 91164764

**APPLICANT BRINKMANN’S REPLY BRIEF RE CROSS-MOTION TO STRIKE
OPPOSER’S REPLY RE MOTION FOR PARTIAL SUMMARY JUDGMENT TO
DISMISS APPLICANT’S PRIOR REGISTRATION AFFIRMATIVE DEFENSE**

Applicant The Brinkmann Corporation (“Brinkmann”) hereby files this reply to the opposition filed by Opposer Brink’s Network, Incorporated (“Brink’s Network”) against Applicant’s cross-motion to strike Opposer’s reply in support of Opposer’s motion for partial summary judgment to dismiss Applicant’s prior registration affirmative defense.

Opposer’s opposition fails to justify the fact that Opposer’s reply brief contained improper new argument. Applicant Brinkmann respectfully respects that the Board consider the arguments made in Applicant’s sur-reply or, in the alternative, pay no consideration to the new argument made in Opposer Brink’s Network’s reply.

I.

DISCUSSION

A. Applicant's Motion to Strike is Not Untimely

Opposer alleges that Applicant Brinkmann's cross-motion to strike Opposer's reply in support of Opposer's motion for summary judgment is untimely and improper. However, Opposer has cited no relevant authority that precludes Applicant Brinkmann from filing a cross-motion.

B. Opposer's Motion to Strike Is Also Procedurally Improper

Opposer also alleges that Applicant's cross-motion to strike is improper under TBMP § 517, which states that the Board generally will not strike a brief or any portion, but will disregard any portions that the Board finds to be improper. *See* TBMP § 517. Applicant respectfully points out that *Opposer* also filed a motion to strike Applicant's sur-reply brief, and to the extent that Applicant's cross-motion is procedurally improper, then Opposer's motion to strike was also procedurally improper.

C. Opposer's Reply Brief Raised an Improper New Argument

Opposer's more significant breach, however, was to submit improper new argument in its reply brief, which precluded Applicant Brinkmann from addressing it short of filing a sur-reply. Opposer's motion for partial summary judgment to dismiss Applicant's prior registration defense identified a number of "uncontested material facts", none of which involved the issue of use or non-use of the third party registrations asserted by Applicant in its Answer. *See* MOTION FOR PARTIAL SUMMARY JUDGMENT at pp. 2-4. Applicant had no prior notice that Applicant would have to address this issue in its opposition, since Opposer's arguments related

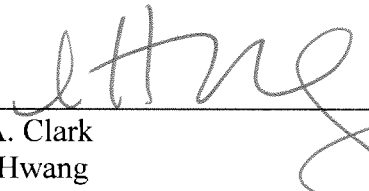
to this issue were set forth for the first time in its reply brief. *See Hard Rock Café Licensing Corp. v. Thamas D. Elsea*, 1996 TTAB LEXIS 493, * 1 (Apr. 18, 1996) (“We have not considered applicant’s [reply brief and attached supporting exhibits because] [c]onsideration of these materials now, without allowing opposer to address them with argument and evidence, would be unfair.”). While Opposer tries to characterize the introduction of new argument as a response to Applicant’s articulation of the modified prior registration defense in Applicant’s opposition, this only emphasizes the fact that Opposer should not have filed a motion for summary judgment without a clear understanding of Applicant’s prior registration defense.

II.

CONCLUSION

For the reasons set forth above, Applicant Brinkmann respectfully respects that the Board grant Applicant’s motion to strike Opposer’s summary judgment motion reply and to deny Opposer’s motion to strike Applicant’s summary judgment motion sur-reply.

Dated: May 9, 2011



Gary A. Clark

Susan Hwang

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

333 South Hope Street, 48th Floor

Los Angeles, California 90071

Tel.: (213) 620-1780

Fax: (213) 620-1398

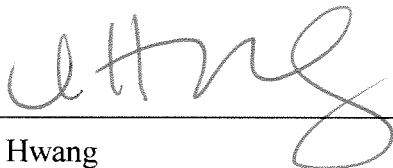
Attorneys for Applicant

THE BRINKMANN CORPORATION

CERTIFICATE OF SERVICE

This is to certify that I have this day, May 9, 2011, caused to be served a copy of the foregoing APPLICANT BRINKMANN'S REPLY BRIEF RE CROSS-MOTION TO STRIKE OPPOSER'S REPLY RE MOTION FOR PARTIAL SUMMARY JUDGMENT TO DISMISS APPLICANT'S PRIOR REGISTRATION AFFIRMATIVE DEFENSE by placing a copy in the United States Mail, postage pre-paid, addressed to counsel for Opposer as follows:

Alan S. Cooper, Esq.
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC 20006



Susan Hwang